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No. _____

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In The

Supreme Court of the United States

CURTIS M. HUNTER,

Petitioner,

v.

WEST LINN-WILSONVILLE SCHOOL DISTRICT 3JT,

Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case squarely represents the question of whether *in rem* jurisdiction in a condemnation proceeding will be allowed to deprive an owner of mineral interests (not named in the condemnation) of any reasonable opportunity to be heard on the question of just compensation. This question is present in almost every one of the vast array of local governmental condemnation proceedings throughout the State of Oregon, and potentially as a precedent throughout the United States.

Petitioner Curtis Hunter purchased aggregate and mineral rights on property owned by the Seida family near the City of West Linn. The value of the mineral rights exceeds 6 million dollars and the contract included extraction royalty payments to the Seida family. Almost two years later, the West Linn-Wilsonville School District ("School District") filed a condemnation suit against the Seida family for a portion of the land, but did not include Petitioner as one of the property owners in the lawsuit. Petitioner's motion to intervene in the condemnation action was denied and the School District entered into a settlement agreement with the Seida family for approximately 1.2 million dollars which limited the payment of condemnation funds to only the named "defendants" – the Seida family. The Oregon Supreme Court upheld the denial of Petitioner's motion for intervention in the condemnation proceeding. *West Linn-Wilsonville School District 3JT v. Hunter*, 328 Or. 10, 968 P.2d 1268 (1998). The School District extracted, processed and utilized the aggregate prior in constructing a school. Petitioner filed

QUESTIONS PRESENTED FOR REVIEW – Continued

suit against the School District for inverse condemnation claiming at least, the 82% shortfall in the condemnation damages violated the Fifth and Fourteenth Amendments to the U.S. Constitution.

In the inverse condemnation case, the trial court granted the School District's motion for summary judgment based upon the ruling that the prior *in rem* condemnation extinguished all of Petitioner's rights, including the *in personam* right to just compensation. The only evidence in the record of the highest and best use for the property, including the use of the property for mineral rights, established an uncontested fair market value exceeding 6 million dollars. The judgment of the Oregon Court of Appeals, affirmed by the Oregon Supreme Court by denying review, held that the prior condemnation judgment extinguished all rights of the Petitioner to the aggregate and mineral rights, including any right to just compensation under the Fifth Amendment of the U.S. Constitution. Further, the only recourse that Petitioner was deemed to possess was to seek participation in the allocation of the already determined condemnation award itself (even though this award was less than 1/5th the value of the property "taken") and such insufficient award was not a denial of Due Process. The questions presented are:

1. Where an owner of proprietary interest is not included in the condemnation proceeding, is subsequently deprived of any reasonable opportunity to be heard on the question of just compensation and the resulting condemnation award is substantially less than

QUESTIONS PRESENTED FOR REVIEW – Continued

the fair market value for the proprietary interest "taken", is this limitation a denial of due process and just compensation under the Fifth and Fourteenth Amendments of the U.S. Constitution?

2. Where the condemning public body enters into a settlement agreement with one owner which is accepted by the court without an evidentiary hearing, fails to determine the highest and best use for the property and its corresponding just compensation, and further limits the disbursement of the condemnation funds to only the participating owner in the settlement, will the *in rem* jurisdiction of the condemnation proceeding extinguish all other proprietary interests, including the *in personam* right to just compensation?

3. Where the amount of just compensation in a condemnation proceeding is at issue, does the Just Compensation Clause of the Fifth Amendment of the U.S. Constitution require more than a mere exclusive agreement between the government and only part of the property owners, and instead requires at least a judicial evaluation of full value, considering the highest and best use, of the property taken?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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The Oregon trial court order for summary judgment is reproduced as Appendix B. The decision of the Oregon Court of Appeals is reported at 173 Or. App. 514, 22 P.3d 1235 (2001), and is reproduced as Appendix A. The decision of the Oregon Supreme Court denying review is reported at 332 Or. 430, 30 P.3d 1183 (2001), and is reproduced as Appendix C. The Oregon trial court final judgment in the prior condemnation proceeding is reproduced as Appendix F. Page references are to the version of the Appendix.

JURISDICTION

The decision of the Oregon Supreme Court, review of which is sought on petition, was entered on August 14, 2001, and appellant judgment was on April 25, 2001. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The statutes at issue are Oregon Revised Statutes (ORS) 332.182 which provides in pertinent part: "Whenever it is necessary for any school district to acquire any real property for necessary school purposes . . . the district school board may commence and prosecute any necessary or appropriate action for condemnation of the real property required for school purposes." Oregon Revised Statutes Chapter 35 pertains to eminent domain procedures. ORS 35.355 provides in pertinent part: "Either party to the action may appeal from the judgment in like manner and with like effect as in ordinary cases, but the appeal shall not stay the proceedings so as to prevent the condemnor from taking possession of the property and using it for the purposes for which it is being appropriated." ORS 35.365 provides in pertinent part: "If the defendant withdraws the compensation award by the court or jury, the defendant waives the right of appeal. . . . "

STATEMENT OF THE CASE

A. Procedural History

This action was proceeded by an action in which the West Linn-Wilsonville School District 3JT ("School District") filed a condemnation suit against the Seida family for 17.68 acres of their land directly abutting the City of West Linn, but did not include the Petitioner Curtis Hunter as one of the property owners in the lawsuit. The Seida family entered into a settlement agreement with the School District which was entered into the record as a "Final Judgment" on December 12, 1966. Petitioner's

motion to intervene in the condemnation action was denied and Petitioner was not allowed as a "party" in the final judgment of the condemnation proceeding. Petitioner appealed the denial and the Oregon Court of Appeals stayed the condemnation proceedings. This appeal was expedited to the Oregon Supreme Court, who after oral argument entered its decision affirming the denial of intervention on November 27, 1998.

On February 12, 1997, Petitioner filed a claim for inverse condemnation in the Oregon Circuit Court (trial court) alleging that the School District had "taken" the Petitioner's property without paying just compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. This case was stayed until the conclusion of the condemnation appeal. Thereafter, the School District filed a motion for summary judgment in the inverse condemnation case asserting that the prior *in rem* condemnation proceeding precluded any subsequent claims by Petitioner for just compensation. The trial court granted the School District's motion by judgment on May 14, 1999. On April 25, 2001, the Oregon Court of Appeals upheld the trial court decision. The Petitioner in turn sought review by the Oregon Supreme Court. That court denied review, thereby affirming the appellant court decision, on August 14, 2001.

B. The Case

This is an inverse condemnation action. The Petitioner contends that he purchased the aggregate and mineral rights to the property approximately two years prior to the School District's condemnation action, that

the value of the mineral rights alone is five times more valuable than the condemnation award, that he was deprived of any re sonable opportunity to be heard on the question of just compensation, and that the School District has taken his property for public use without payment of just compensation.

On January 18, 1994, Petitioner entered into a contract with the landowners (the Seida family) purchasing all the construction rock, gravel and mineral rights to be excavated from the Seida property. App. D. The Seida family was beginning to develop the land with a golf facility that involved extensive excavation and removal of the hilltop bedrock sold to Petitioner. App. A-2.

On October 25, 1995, the School District filed a lawsuit against the Seida family to condemn this property for a new school (Clackamas County Circuit Court case #35-10-408). Petitioner was never served with summons in the condemnation case. On October 30, 1996, Petitioner moved to intervene in the condemnation action to protect his property rights in the aggregate and mineral rights. The School District vigorously objected to that intervention, and on November 8, 1996, the Circuit Court judge denied Petitioner's motion to intervene. App. E-1.

On December 5, 1996, Petitioner filed his notice of appeal for the denial of the motion to intervene. Petitioner also sought a corresponding stay of the condemnation proceedings before the Oregon Court of Appeals, but the stay was granted after the entry of the condemnation judgment and distribution of the condemnation award. App. A-3. On December 12, 1996, judgment was entered in the condemnation case based on settlement by the

School District and the Seida family, specifically limiting the monetary award to only the named defendants (the Seidas). By settlement agreement, the condemnation award was approximately 1.2 million dollars and limited to disbursement to the "defendants" in the condemnation proceeding. App. F-5. The School District proceeded to take possession of the Seida property, including the aggregate and mineral rights owned by Petitioner. The School District excavated Petitioner's rocks and aggregate, processed them into construction graded gravel (both used onsite to build the new school and exported offsite), and permanently precluded Petitioner from extracting and selling aggregate and mineral rights. App. E.

On February 12, 1997, Petitioner filed his complaint for damages for inverse condemnation and, alternatively, specific performance. Thereafter, as stipulated, the Circuit Court proceedings were put in abeyance, pending resolution of the condemnation case appeal. Eventually, in November of 1998 the Oregon Supreme Court affirmed the condemnation trial court's denial of Petitioner's motion to intervene on the basis that the condemnation case proceeds had already been distributed, and the appeal was thus moot. App. A-3.

The inverse condemnation case was then reinstated in March of 1999 in the Clackamas County Circuit Court, and on March 15, 1999 the School District filed its motion for summary judgment. The uncontested value of the mineral rights (rocks, aggregate, etc.) was established in the summary judgment proceeding at *6 million dollars* as compared to the 1.2 million dollar condemnation award. On May 4, 1999, the trial court judge issued his letter

ruling, granting the School District's motion and the judgment was signed on May 14, 1999. App. B.

On appeal, the Oregon Court of Appeals held that the condemnation proceeding for the Seida family property constituted an *in rem* proceeding and therefore, precluded Petitioner's inverse condemnation claim. The court below stated that an *in rem* proceeding "includes the value of all interests in the property, and that payment entitles the government entity taking the property to do so free of all other claims." App. A-4. The court further stated that the only recourse for receiving compensation by Petitioner was "to seek compensation from the condemnation award itself in a supplemental equitable proceeding." App. A-5. Finally, the court ruled that since the *in rem* condemnation proceeding extinguished all ownership interests in the property (including the Petitioner's aggregate and mineral rights), the Petitioner no longer possessed any interest necessary to maintain a claim for inverse condemnation. The court below did *not* address Petitioner's Due Process argument that the condemnation fund in the *in rem* proceeding was indisputably inadequate and Petitioner had been precluded from any reasonable opportunity to challenge the *amount* of the condemnation fund. App. A-6. On August 14, 2001, the Oregon Supreme Court denied review thereby affirming the appellate court decision.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance

when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a Federal Court of Appeals. Under Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT – CAN A PROPRIETARY INTEREST, EXCLUDED AS A PARTY IN A CONDEMNATION PROCEEDING, BE DEPRIVED OF ANY REASONABLE OPPORTUNITY TO BE HEARD ON THE QUESTION OF JUST COMPENSATION?

The precedent established by the decision below throws the door wide open to allowing a governmental body to acquire, through condemnation, a property for which it is required to pay only a fraction of the fair market value or just compensation. Stated bluntly, depriving the Petitioner of any opportunity to be heard on the issue of just compensation is a precedent that gives local governments a "license to steal."

The federal constitutional requirement that no person shall be deprived of life, liberty or property without due process of law is the most essential guarantee of security of our liberties and the stability of our law. Early in our history, "due process" was defined by Daniel Webster in the celebrated *Dartmouth College v. Woodward*, 4 Wheat

(U.S.) 518, 4 L.Ed. 629 (1819), as judgment only after inquiry, hearing and trial. Mr. Webster contended in his brief to the Court as follows: "By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds on inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society." Today, the essential elements of due process of law require: (1) notice and an opportunity to be heard, (2) before a competent tribunal, and (3) in an orderly proceeding which is adapted to the nature of the case and in accord with established rules which do not violate fundamental rights. Nichols, Eminent Domain Sec. 4.10 at 4-49 (3rd rev. Ed. 1992).

In the context of condemnation proceedings, there has always been a mandatory requirement of a judicial determination for "the adequacy of compensation." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325-326 (1893) ["the compensation must be a full and perfect equivalent for the property taken. . . . But when the taking has been ordered, then the question of compensation is judicial."]. This Court defined "due process of law" in the condemnation case of *Appleby v. City of Buffalo*, 166 U.S. 226, 530-531 (1911) as:

> "Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to any compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend,

> cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

Petitioner was denied any opportunity to be heard on the issue of just compensation. Even though the School District knew about Petitioner's proprietary interest in the aggregate and mineral rights prior to initiating condemnation, the School District intentionally excluded Plaintiff as a party in the condemnation proceeding. Petitioner's motion to intervene was denied and thereby precluded him from any meaningful determination of highest and best use and the *amount* of compensation in the condemnation award. The trial court further ruled that Petitioner's denial of intervention was not an appealable order and that Petitioner could only address the court in some other proceeding subsequent to entry of this Final Judgment. App. F-2. The effect of this Final Judgment was that Petitioner was precluded from any opportunity to be heard on the issue of just compensation before the condemnation award was finalized. Petitioner appealed the trial court's denial of intervention and sought a stay of the condemnation proceedings, pursuant to statute, at the Oregon Court of Appeals. Before the stay was ordered, however, the trial court disbursed the condemnation award to the condemnation defendant (the Seida family) leaving no compensation for the Plaintiff. On appeal to the Oregon Supreme Court, the stay was terminated and the decision of the trial court was affirmed (including its determination that the denial of intervention was not a final order for purposes of appeal). The Oregon Supreme Court reasoned that since the condemnation award had been disbursed before the

stay became effective, the condemnation proceeding was concluded and, therefore, any issue of procedural irregularity was "moot." *West Linn-Wilsonville School District v. Seida*, 328 Or. 10, 968 P.2d 1268 (1998).[1] Correspondingly, Petitioner was not entitled, under Oregon law, to appeal the determination of the amount of just compensation. Only a "party" to the condemnation proceeding is entitled to appeal the judgment. ORS 35.355. The condemnation final judgment specifically precluded Petitioner from participating in the distribution of the condemnation award because Petitioner was not a named "defendant." See, App. F-5, Para. 7. Even if the Petitioner were allowed to participate in the distribution of the condemnation award, under Oregon law the Petitioner would be precluded from challenging the overall just compensation of the award and would waive all rights to appeal. ORS 35.365. Further, participation in the condemnation award distribution would have been futile since the award was less than 1/5th the fair market value for Petitioner's aggregate and mineral rights.

Thereafter, Petitioner filed a claim for inverse condemnation alleging that his property had been "taken"

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[1] It should be noted that if the lower court had found that Petitioner was a proper party for intervention, petitioner would have been entitled to challenge the amount of just compensation as inadequate. Therefore, how could a mere distribution of the condemnation award have rendered the appeal "moot"? The distribution of the award would render the appeal "moot" only if the award was final and could not be challenged on the appeal of a denial of intervention. Thus, the Oregon Supreme Court decision accepts the notion that an *in rem* condemnation proceeding will extinguish all proprietary interests, even those that were properly in the process of appeal.

without paying just compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. The trial court allowed the School District's motion for summary judgment asserting that the prior *in rem* condemnation proceeding precluded any subsequent claims by Petitioner for just compensation, even though the uncontested fair market value for the Petitioner's aggregate and mineral rights was in excess of 6 million dollars (the prior condemnation award being only approximately 1.2 million dollars). The preclusion of Petitioner's inverse condemnation claim was affirmed by Oregon appellate courts. App. A and C.

Petitioner is not challenging the right of the School District to "take" all ownership interest in the property, including the aggregate and mineral rights. Petitioner is challenging the complete preclusion of any inquiry, hearing and/or trial that would have given Petitioner an opportunity to be heard on the issue of the amount just compensation. Here, the condemnation award was not determined at any inquiry, hearing and/or trial, but was a "private" settlement between a few of the property owners and the School District. That settlement compensation amount was merely read into the trial court record as a basis for the condemnation's final judgment.[2] See, App. F-2. No judicial hearing or determination was made

[2] Normally, a trial judge or jury would hear evidence on the issue of just compensation before rendering a verdict. See, 27 Am Jur 2nd, Sec. 479 at 45. Thus, the highest and best use is determined and a full or just compensation (usually fair market value) is established based on the evidence at the hearing or trial.

as to the sufficiency of the just compensation of the condemnation's 1.2 million dollar award.

Further, Petitioner is not seeking to eliminate the generally accepted two-step process for apportionment of condemnation awards, commonly called the "unit rule," the "undivided fee rule" or the "undivided basis rule."[3] The fundamental issue for due process of law when a proprietary interest is precluded from the first step, however, is that the compensation was determined through an adequate judicial inquiry, hearing and/or trial. If so, the condemnation award satisfies just compensation and can later be apportioned in the second step among all the ownership interests (named or unnamed in the condemnation). Nichols, Eminent Domain Sec. 12.36 (3rd rev. Ed.); 2 Lewis on Eminent Domain, 3rd ed., Section 716 at 1253: "When there are different interests or estates in the property, the proper course is to *ascertain the entire compensation* as though the property belonged to one person and then apportionment this sum among the different parties according to their respective rights." (Emphasis added). Essentially, the total condemnation award must not be less than the total just compensation for the property taken. *Monongahela Navigation Co. v. United States, supra at* 325-326.

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[3] See, 26 Am Jur 2nd, Sec. 258: "In the first step, the court or jury ascertains the total compensation, as if all rights in the parcel belonged to one person; in the second step, the court or jury apportions that award among the various ownership interests in the parcel."

Petitioner is not seeking to have a separate condemnation award for his aggregate and mineral rights. Petitioner is contending that just compensation includes mineral deposits to the extent that they enhanced the value of the land. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) [where the grant or reservation of minerals and the right to mine them constitute property rights which the law will recognize and which may not be taken for a public use without compensation]; see also under Oregon law, *State Highway Commission v. Arnold*, 218 Or. 43, 341 P.2d 1089 (1959); *Highway Commission v. Nunes*, 233 Or. 547, 379 P.2d 579 (1963) [allowing an income approach to determining the just compensation for property that includes commercially marketable gravel]. These decisions presume the necessity of, at least, having a judicial inquiry, hearing or trial on the potential impact of mineral rights on the determination of just compensation. Here, the lower court completely precluded Petitioner from having any opportunity to be heard on the issue of how his aggregate and mineral rights affected the highest and best use, as well as, just compensation for the property. Without any inquiry or evaluation, the lower court accepted the "private" settlement determination of a condemnation award. The School District, simply by *ipse dixit*, may not transform private property into public property without compensation. See, *Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2463 (2001).

II.

THIS PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING THE AVAILABILITY OF AN INVERSE CONDEMNATION CLAIM AND WHETHER THE CONSTITUTIONAL REQUIREMENT OF JUST COMPENSATION CAN BE USURPED BY SPECIOUS PROCEDURAL LIMITATIONS

The lower court held that since the *in rem* condemnation proceeding extinguished all ownership interests in the property (including the Petitioner's aggregate and mineral rights), the Petitioner no longer possessed an ownership interest necessary to maintain a claim for inverse condemnation. App. A-6. This absolute preclusion was imposed even though Petitioner was not allowed to be heard on establishing the amount of condemnation award, that the condemnation award did not include consideration of Petitioner's aggregate and mineral rights, and that it was uncontested that the condemnation award was only 1/3 the value of those aggregate and mineral rights.

In conflict with Oregon appellate court ruling that an *in rem* condemnation extinguishes all claims for compensation, including inverse condemnation claims based upon inadequacy of just compensation, this Court has defined "inverse condemnation" in *United States v. Clarke*, 445 U.S. 253, 257 (1980) as "The phrase 'inverse condemnation,' as common understanding of that phrase would suggest, simply describes an action that is the 'inverse' or 'reverse' of a condemnation proceeding." The critical issue is whether the *in rem* condemnation proceeding

satisfied all the requirements of the Fifth Amendment for due process and just compensation. Wherever the *in rem* proceeding fails the minimum requirements, the constitutional requirement for due process and just compensation remain. See, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987), where this Court stated "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .'" Here, the form of the proceeding deprived Petitioner of any opportunity to be heard on the issue of just compensation, and as a result, the condemnation award violated the "Just Compensation" clause of the Fifth Amendment. As stated in *Appleby v. City of Buffalo*, *supra* 221 U.S. at 530-531, "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

Essentially, the exercise of the power of eminent domain (which is *in rem*) takes away the title to the premises from the former owners. However, the former owner is then relegated to a claim *in personam* based upon his right to just compensation. Nichols, Eminent Domain Sec. 1.142[3] (3rd rev. Ed.); see also, *United States v. Dunnington*, 146 U.S. 338 (1892). The Oregon appellate courts have eliminated all remaining *in personam* claims even where the compensation was 1/3 of the minimum required for just compensation. Since an eminent domain proceeding is *in rem*, there are no indispensable parties and the

failure to join a party does not defeat the condemnor's title to the property taken. This Court, however, has long determined that the condemnee will still retain his right to compensation. *A. W. Duckett & Co. v. United States*, 266 U.S. 149 (1924). Indeed, the fact that the condemnor entered into an agreement regarding the condemnation with one or some of the proprietary interests, does not obviate the non-participating proprietary interest's right to just compensation through a separate inverse condemnation claim. *A. W. Duckett, supra* at 151, where this Court stated "Any arrangement that the Government may have made later with the owner [one of the owners] to pay to it what money be due to the tenants or some of them did not affect the claimant's rights."

The apparent vast majority of opinions in the highest court of the states has long been in direct conflict with the Oregon Supreme Court's recent decision. See, California – *Pomona College v. Dunn*, 7 Cal. App.2d 227, 46 P.2d 270 (1935); Connecticut – *Palo v. Rogers*, 116 Conn. 601, 165 A. 803 (1933); Georgia – *Department of Transportation v. Garrett*, 267 S.E.2d 643 (1980); Illinois – *City of Chicago v. Gage*, 268 Ill. 232, 109 N.E. 28 (1915); Minnesota – *Lumbermen's Ins. Co. v. St. Paul*, 82 Minn. 497, 85 N.W. 525 (1901); Missouri – *State ex rel. State Highway Commission v. Eilers*, 445 S.W.2d 374 (1969); New York – *In re City of New York*, 273 N.Y. 62, 6 N.E.2d 98 (1937); Oklahoma – *Morse v. Board*, 169 Okla. 600, 38 P.2d 945 (1934); Pennsylvania – *Finality-Philadelphia Trust Co. v. Kraus*, 325 Pa. 581, 190 A. 874 (1937); see also, North Dakota – *Southeast Cass Water Resource District v. Burlington N. R.R. Co.*, 527 N.W. 2d 884 (N. D. 1995) [where the Supreme Court of North Dakota held that both federal and state precedents were to be

considered in determining the "taking" of private property for public use, on grounds that the state constitution cannot be interpreted to grant narrower rights that are guaranteed under the federal constitution].

The Oregon Supreme Court's decision is also in direct conflict with the compensatory remedies allowed by this Court for a "physical taking." Since the Petitioner's due process guarantees were violated and just compensation was not appropriately addressed in the tribunal below, Petitioner retained a right to obtain just compensation. The School District's subsequent occupation of the property and the irreversible use of the aggregate and minerals constitute a "physical taking" of Petitioner's remaining rights (whether real or personal property). *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 420 (1982). The School District continues to possess a gigantic "windfall," i.e., the missing value of 6 million dollars in aggregate and mineral rights.

Furthermore, the Oregon Supreme Court appears to stand alone in its willingness to exclude, through a specious procedural interpretation, all consideration of mineral rights in valuing just compensation in a condemnation proceeding. See, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *United States v. 103.38 Acres of Land* 660 F.2d 208 (CA 6 Ky. 1981); *Department of Public Works & Buildings v. Oberlaender*, 92 Ill. App. 2d 174, 235 N.E.2d 3, *aff'd*, 42 Ill. 2d 410, 247 N.E.2d 888 (1969); *Gulf Interstate Gas Co. v. Garvin*, 368 S.W.2d 309 (Ky. 1963); *Lafayette Airport Commission v. Roy*, 265 So.2d 459, *cert. den.*, 262 La. 1159, 266 So.2d 444, *cert. den.*, 411 U.S. 916 (1973); *State ex rel. Nevada Department of Transportation v. Las Vegas Building Materials*, 104 Nev. 479, 761

P.2d 843 (1988); *In re Lee*, 85 NC App. 302, 354 S.E.2d 759, *review den.*, 320 NC 513, 358 S.E.2d 520 (1987); *West Virginia Department of Highways v. Berwind Land Co.*, 167 W. Va. 726, 280 S.E.2d 609 (1981).

This Court has long ago addressed the principles necessary for evaluating whether just compensation has or has not been provided. In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 2581 (1997) stated that:

> "The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governance assertions of jurisdiction *in personam* is simple and straightforward. It is premised on the recognition that (t)he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing (Citations omitted). This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interest of persons in a thing'."

In turn, that jurisdictional basis must include satisfaction of the requirement of just compensation: "The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken." *Phelps v. United States*, 274 U.S. 341, 344 (1927).

CONCLUSION

In the aftermath of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), local governments, particularly within the

State of Oregon, have vigorously experimented with novel methods of financing governmental improvements (which benefit the public as a whole) by placing the burden for the cost of these public benefits upon a single property owner.

The court below has validated an unprecedented expansion of *in rem* restrictions by enabling a local government to pervert *in rem* jurisdiction into an excuse to "steal" 82% of the value of the property taken.

This appeal raises important issues regarding the application of *in rem* jurisdiction in condemnation cases and how it affects rights for "just compensation" protected under the Fifth and Fourteenth Amendments of the U.S. Constitution. The critical issue here is whether a doctrine of *in rem* jurisdiction will be allowed to be so expanded as to directly usurp and otherwise violate mandatory provisions for due process and just compensation in the U.S. Constitution. These same issues potentially arise in every condemnation case where all the property owners and interests are not named as defendants. Petitioner believes the decision of the court below is a distortion of a legal principle, results in a serious and irreversible injustice, and stands as a dangerous precedent to all states.[4]

---

[4] This lower court precedent will open the door for flagrant abuses of condemnation powers, as well as make a mockery of constitutionally protected rights. For example, any condemning local government could file a condemnation proceeding against a 100 acre farm that possessed 6 million dollars worth of oil reserves under its surface. In this example, the local government would only have to obtain service of summons upon the

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari.

DATED: November 12, 2001.

Respectfully submitted,

JOHN W. SHONKWILER
Attorney at Law
13425 SW 72nd Avenue
Tigard, OR 97223
Telephone: (503) 624-0917

Attorney for Petitioner

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leasehold party who is in possession of the dwelling located on the "surface," enter into a settlement agreement to acquire the entire property for *one cent on the dollar*, and have that settlement read into the court record as the final judgment. A leasehold interest is a "property interest" subject to condemnation and a tenant (particularly a disreputable one) might be enticed into excepting a "bonus" of $60,000. The "windfall" of $5,040,000 by the local government may seem like a clever way of structuring its condemnation strategy, but it still constitutes a "theft" by any reasonable and honest person.

APPENDIX A

FILED: April 25, 2001

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

CURTIS M. HUNTER,

Appellant.

v.

WEST LINN-WILSONVILLE
SCHOOL DISTRICT 3JT,

Respondent.

97-02-191; A106792

Appeal from Circuit Court, Clackamas County.

Robert D Herndon, Judge.

Argued and submitted October 2, 2000

John W. Shonkwiler argued the cause for appellant. On the briefs was Jeffrey S. Seymour.

Peter S. Mersereau argued the cause for respondent. With him on the brief was Thomas W. McPherson.

Before LANDAU, Presiding Judge, and LINDER and BREWER, Judges.

LANDAU, P.J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.

[X] Costs allowed, payable by: Appellant

[ ] Costs allowed, to abide the outcome on remand, payable by:

LANDAU, P.J.

Plaintiff appeals a summary judgment dismissing his claims for specific performance and inverse condemnation. We affirm.

The relevant facts are not in dispute. Plaintiff entered into a contract with Kent Seida to purchase all decorative landscape boulders and construction rock to be excavated from Seida's land, which Seida planned to develop as a golf course. Shortly after Seida began construction of the golf course, defendant West Linn-Wilsonville School District 3JT (district) initiated an action to condemn the property to build a middle school. Plaintiff moved to intervene in the condemnation action, but that motion was denied.

Plaintiff appealed the trial court order denying the motion to intervene. He did not file a motion in the trial court to stay proceedings during the pendency of the appeal. He did, however, file a motion to stay in this court.

Meanwhile, Seida and the district settled the condemnation proceeding for approximately $1.2 million. The trial court conducted hearings to determine the form of the judgment. Plaintiff participated in those hearings. The trial court asked plaintiff whether he intended to claim any portion of the $1.2 million. Plaintiff declined, explaining that, as far as he was concerned, he was not a

party to the condemnation proceeding, and the settlement determined only the interests of the parties. The trial court entered judgment on the condemnation proceeding, awarding the district the property and requiring the district to pay Seida approximately $1.2 million. The district paid Seida.

Soon thereafter, this court granted plaintiff's motion to stay the trial court proceedings. The district sought review of that decision. The Supreme Court vacated this court's decision, holding that the full payment of the settlement had rendered the case moot because any action on appeal would "have no practical effect on the eminent domain proceeding." *West Linn-Wilsonville School Dist. 3 J T v. Seida*, 328 Or 10, 14, 968 P2d 1268 (1998).

Plaintiff then initiated this action against the district. He alleged two claims. The first claim is for specific performance. Plaintiff's theory is that, by taking title to Seida's land, the district also took on the responsibility for performing the contract for the sale of boulders and construction rock. The second claim is for inverse condemnation. According to plaintiff, by building a school on Seida's property, the district, in effect, has taken his boulders and rocks without paying for them.

The district moved for summary judgment on both claims. The district argued that plaintiff could not prevail on either claim because any rights to the boulders and rocks were disposed of in the condemnation proceeding. Plaintiff argued that the condemnation proceeding disposed only of claims against the property by the district, not by others who were not parties. The trial court granted the district's motion.

On appeal, plaintiff argues that the trial court erred in entering summary judgment against him on both claims. In reviewing the trial court's decision, we examine the record in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. ORCP 47 C; *Allen v County of Jackson*, 169 Or App 116, 123, 7 P3d 739 (2000).

We begin with the specific performance claim. Plaintiff argues that, as the owner of Seida's property, the district is obligated to make good on Seida's contractual obligation to sell him boulders and rocks. The district argues that the condemnation action extinguished all claims against the property, including any contractual claims. We agree with the district.

A condemnation proceeding determines all claims against the property, not just those claims asserted by parties to the proceedings. As the Supreme Court has explained:

> " 'A condemnation proceeding is an action in rem. It is not the taking of rights of designated persons, but *the taking of the property itself.*' "

State Highway Com. v. Burk et al., 200 Or 211, 245, 265 P2d 783 (1954) (emphasis in original) (quoting *Eagle Lake Improvement Co. v. United States*, 160 F2d 182, 184 (5th Cir 1947)). Accordingly, the money paid to a landowner pursuant to a judgment in a condemnation proceeding includes the value of all interests in the property, and that payment entitles the government entity taking the property to do so free of all other claims. *State Highway Com.*, 200 Or at 243 (quoting *Nichols on Eminent Domain* § 12.36

(3d ed 1950)). Contracts with the landowner are, in effect, extinguished by the judgment. *Id.* The only recourse for the parties to such contracts is to seek compensation from the condemnation award itself in a supplemental equitable proceeding. *Id.* at 258-59; *see also State Highway Com. v. Superbilt Mfg. Co.*, 200 Or 478, 481, 266 P2d 1072 (1954).

In this case, therefore, the effect of the judgment in the condemnation action was to award the Seida property to the district free of all other claims, including those claims arising under the contract with plaintiff. Plaintiff's recourse was to seek compensation from the condemnation award itself, as the trial court suggested. Plaintiff declined to do that. He cannot be heard to complain now that he failed to receive compensation for his interest in the property.

Plaintiff insists that this case should be treated differently, because the judgment was entered upon a settlement, as opposed to a jury verdict. Plaintiff cites no authority – and we are aware of none – for the proposition that the effect of a judgment *in rem* depends on the nature of the events that preceded it. To the contrary, the legal effect of the judgment derives from the nature of the *in rem* proceeding itself. An *in rem* proceeding, by its very nature, "is conclusive and binding upon all persons who may have or claim any right or interest in the subject matter of the litigation." *Masterson v. Pacific L.S. Co.*, 144 Or 396, 402, 24 P2d 1046 (1933).

Plaintiff similarly argues that there are genuine issues of material fact concerning whether the parties intended the judgment in the condemnation proceeding to have the effect of extinguishing all prior claims to the

property. Again, however, the effect of an *in rem* judgment is a legal question determined by the nature of the proceeding itself, not by the intentions of the parties. We conclude that the trial court did not err in entering summary judgment on plaintiff's specific performance claim.

We turn to the inverse condemnation claim. "Inverse condemnation" occurs when the state takes private property for public use without exercising its power of eminent domain. *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 130, 895 P2d 755 (1995). It is axiomatic that, in order to claim inverse condemnation, a plaintiff must have an interest in the property in the first place. *Kinross Copper Corp. v. State of Oregon*, 160 Or App 513, 519, 981 P.2d 833 (1999), *rev den* 330 Or 71, *cert den* ___ US ___, 121 SCt 387 (2000).

In this case, as we have explained, with the entry of the judgment in the condemnation case, whatever rights in the boulders and construction rocks plaintiff may have acquired under his contract with Seida were extinguished. Thus, any subsequent action by the district cannot have amounted to a taking of plaintiff's property rights. By that time, plaintiff had no property rights for the district to take.

Plaintiff argues that the trial court erred in other respects, but we reject those arguments without discussion.

Affirmed.

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

CURTIS M. HUNTER, Plaintiff, v. WEST LINN-WILSONVILLE SCHOOL DISTRICT 3JT, Defendant.	Case No. 97-02-191 JUDGMENT (Filed May 25, 1999)

This matter came before the court on defendant's motion for summary judgment. The court granted plaintiff's motion, which finally disposed of all claims pending between the parties.

It is ORDERED and ADJUDGED that defendant is awarded final judgment against plaintiff for the sum of $635.00, together with interest thereon at the rate of 9% per annum from the date of entry of the within judgment, until paid.

MONEY JUDGMENT

1. Judgment Creditor..... West Linn-Wilsonville High School
2. Attorney for Judgment Creditor.... Peter R. Mersereau
3. Judgment Debtor..... Curtis M. Hunter
4. Attorney for Judgment Debtor... Jeffrey S. Seymour

5. Judgment Amount [see attached Statement of Costs & Disbursements]..... $635.00

6. Post Judgment Interest: Simple interest at nine percent (9%) per annum on total Judgment which consists of item 5, from the date Judgment is entered until paid.

DATED this 14th day of May, 1999.

/s/ Robert D. Herndon
Honorable Robert D. Herndon
Clackamas County Circuit
Court Judge

Submitted by:

Peter R. Mersereau
MERSEREAU & SHANNON, LLP
1600 Benj. Franklin Plaza
One SW Columbia Street
Portland, Oregon 97258
Tel: (503) 226-6400

Of Attorneys for Defendant

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF OREGON

CURTIS M HUNTER Appellant/Petitioner v. WEST LINN-WILSONVILLE SCHOOL Respondent/Respondent	)	ORDER DENYING REVIEW CA A106792 SC S48509

The Court has considered the petition for review and orders that it be denied.

DATE: August 14, 2001.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

JEFFREY SPENCER SEYMOUR	Attorney for Appellant/Petitioner
JOHN W SHONKWILER	Attorney for Appellant/Petitioner
PETER R MERSEREAU	Attorney for Respondent/Respondent

APPENDIX D

THIS AGREEMENT, Made JAN. 18th, 1994, *between* KENT RAY SEIDA *of the city of* CLACKAMAS, *county of* CLACKAMAS *and state of* OREGON, *party of the first part, and* CURTIS M. HUNTER *of the city of* LINCOLN CITY, *county of* LINCOLN *and state of* OREGON, *party of the second part,*

WITNESSETH, That the said party of the first part, for and in consideration of the covenants hereinafter contained on the part of the said party of the second part, does hereby covenant and agree to and with the said party of the second part as follows:

SELL TO CURTIS M. HUNTER ALL THE SURFACE AND UNEARTHED HARVESTABLE DECORATIVE LANDSCAPE BOULDERS – CONSTRUCTION ROCK/GRAVEL WHICH MAY BE EXCAVATION. DOES NOT INCLUDE ANY OF THE TOP SOIL AND ANY OTHER SOIL MATERIALS.

THE LOCATION OF THE ROCK MATERIALS ARE LOCATED WITHIN THE FOLLOWING BOUNDARIES OF THE SEIDA PROPERTY. FROM THE PROPERTY CORNER STAKE ALONG DAY ROAD AND THE NORTH PROPERTY LINE OF THE SEIDA PROPERTY THENCE WESTERLY ALONG THE NORTH PROPERTY LINE FOR A DISTANCE OF 450 FEET WHICH IS THE POINT OF BEGINNING OF THE BOUNDARY OF THE ROCK REMOVAL AREA. THENCE WESTERLY FOR 97 FEET MORE OR LESS TO THE CORNER STAKE, THENCE NORTHERLY 200 FEET ALONG THE PROPERTY LINE TO THE PROPERTY CORNER STAKE. THENCE WESTERLY

ALONG THE PROPERTY LINE FOR 500 FEET, THENCE SOUTHERLY AT A 90 DEGREE ANGLE FOR 300 FEET. THENCE EASTERLY AT A 90 DEGREE ANGLE FOR 597 FEET. THENCE NORTHERLY FOR 300 FEET TO THE BEGINNING POINT ALONG THE NORTH PORPERTY LINE.

MATERIALS WILL BE STORED ONLY ON THE SOUTH-EASTERN PORTION OF THE SEIDA PROPERTY STARTING APROX. [sic] 100 FEET NORTH OF THE NORTH WALL OF THE EXISTING HOUSE NEAR DAY ROAD. THE PURCHASE PRICE IS $31,500.00 FOR A PERIOD OF TEN YEARS WITH THE FIRST OPTION TO RENEW AT THE SAME PRICE FOR AN ADDTIONAL [sic] TEN YEAR PERIOD.

And the party of the second part in consideration of said covenants on the part of the party of the first part, does covenant and agree with said party of the first part, that the said party of the second part, will

PAY TO KENT SEIDA THE AMOUNT OF 10% OF THE GROSS SALES TWICE PER FISCAL YEAR. RECEIPTS OF ALL SALES WILL BE INCLUDED WITH EACH PAYMENT. MATERIALS WILL BE LEFT IN A STOCK PILE AND WITHIN THE CONFINED AREA, AS INDICATED ABOVE. ACCESS TO THE MATERIAL STOCK PILE WILL BE DESIGNATED BY KENT SEIDA. ALL REPAIRS TO FENCES AND GRASS AREAS WILL BE MADE BY HUNTER, WITHIN THE ACCESS AND STOCK PILE AREAS.

In construing this agreement and where the context so requires, the singular includes the plural.

IN WITNESS WHEREOF, the said parties have hereunto set their hands, the day and year first above written.

/s/ Kent Ray Seida
/s/ Curtis M. Hunter
/s/ _____
/s/ _____

APPENDIX E

COMPLAINT

On February 12, 1997, Plaintiff filed in the Clackamas County Circuit Court a

COMPLAINT

stating a claim as follows:

GENERAL ALLEGATIONS

1.

At all times material hereto, Plaintiff was and is a resident of Lincoln City, Lincoln County, Oregon.

2.

At all times material hereto, Defendant was and is a municipal corporation organized and operating under the laws of the State of Oregon. Defendant was and is vested with the statutory authority to exercise the power of eminent domain, and to condemn real property, or any part thereof, in order to carry out a public purpose otherwise authorized by statute.

3.

At all times material hereto, except as set forth below, Kent Seida, Joyce Burnett, fka Joyce Seida, and David Seida ("Seidas") were formerly the owners of a tract of land described as "Tax Lot 200 of Section 26, Township 2 South, Range 1 East, Willamette Meridian, Clackamas County, Oregon", comprising approximately 55.18 acres ("Seida property"). Kent Seida had authority to enter into

contracts affecting this parcel of land on behalf of the Seidas. Of the total 55.18 acres, the east one-third, about 20 acres, is material to this action, and is particularly described in Exhibit 1 to this complaint.

4.

By January 1, 1994, Kent Seida had applied for and obtained initial land use approval from Clackamas County to develop and build a public golf facility on the Seida property, including the property described in Exhibit 1. As part of the approved golf facility site development, Kent Seida had to excavate and remove boulders and rock from part of the site.

5.

On January 18, 1994, Plaintiff entered into a contract with Kent Seida, Exhibit 2 to this complaint. The portion of Seida's property relating to Plaintiff's contract is approximately seven acres, and is particularly described in the contract, Exhibit 2. This contract was in furtherance of Kent Seida's plan to develop the golf facility.

6.

Under the contract, Plaintiff purchased, and Seida sold, all the surface and unearthed harvestable decorative landscape boulders and construction rock and gravel ("boulders and rock") which was going to be excavated from the parcel of land described in Exhibit 2.

7.

As the agreed to consideration for purchasing the boulders and rock, Plaintiff paid Seida $31,500, and was to pay Seida, twice yearly, 10% of the gross sales of the boulders and rock as Plaintiff sold them. The contract period of performance was for ten (10) years. In addition, Plaintiff had the option of renewing the contract for an additional 10 year period, at the same consideration ($31,500 plus 10% of gross sales).

8.

On July 31, 1995, Defendant, through its school board, approved a resolution of public necessity, 96-4, to condemn the portion of Seida's property described in Exhibit 2. On October 25, 1995, Defendant filed a complaint to condemn the portion of Seida's property. Clackamas County Circuit Court case No. 95-10408.

9.

Plaintiff first learned of Defendant's condemnation action in mid-August, 1996, and sent a letter to Defendant on August 22, 1996, informing Defendant of his property interest as set forth in the contract. After no response from Defendant, Plaintiff wrote another letter to Defendant on September 23, 1996, similar to the first letter.

10.

Defendant, through its attorney, eventually contacted Plaintiff, and scheduled Plaintiff's deposition for October

23, 1996. Defendant's condemnation action against Seida was scheduled for trial on November 12, 1996.

11.

On October 22, 1996, Seida filed a Motion to Join Plaintiff as a necessary party to the condemnation action, and on October 30, 1996, Plaintiff filed a Motion to Intervene in the condemnation action.

12.

On November 8, 1996, in a joint telephone hearing, the motions to join and to intervene were denied. On November 12, 1996, Defendant and Seida negotiated a settlement of the condemnation action with the assistance of The Honorable Sid Brockley, the trial judge assigned to the condemnation action. The record shows that Plaintiff was not included in the settlement, and no compensation for Plaintiff's interest was included in the monetary award to Seidas.

13.

Under the terms of the settlement agreement and final judgment in the condemnation action between Defendant and Seida, Defendant took all rights, interest and title to the portion of Seida's property described in Exhibit 1, which includes Plaintiff's boulders and rock.

14.

Defendant has refused to recognize Plaintiff's contractual interests as set forth above. Defendant intends to build its new school on the condemned property, with its site development plans showing that the portion of land described in Plaintiff's contract with Seida will be excavated for athletic fields/facilities and parking. Defendant intends to use Plaintiff's boulders and rock in developing this part of the school site, without providing just compensation to Plaintiff.

15.

Defendant's plans for developing the property will prevent Plaintiff from removing his contractually agreed-to boulders and rock, and will extinguish his interest in that property right.

16.

The estimated gross sales amount of Plaintiff's boulders and rock is $2.5 million, and Plaintiff's estimated profit from the sales is $1.5 million. The true value will be proven at trial.

FIRST CLAIM FOR RELIEF

(Specific Performance)

17.

Plaintiff realleges paragraphs 1-14 of the Complaint, and they are incorporated by reference herein as if fully set forth.

18.

In condemning Seida's property and obtaining a judgment through a negotiated settlement, Defendant takes all right, title and interests in that property, including taking subject to Plaintiff's valid contract to remove and sell the boulders and rock. Defendant now stands in Seida's place regarding the contract with Plaintiff, and is responsible for performing that contract.

19.

Plaintiff has performed all conditions precedent on his part to be performed pursuant to the contract.

20.

Plaintiff is ready, willing and able to perform his obligations under the contract, and will pay Defendant 10% of the gross sales as set forth in the contract.

21.

Because Plaintiff cannot afford to procure a similar amount and quality of boulders and rock, with the same site accessibility, in the immediate area, at an affordable price, damages will not adequately compensate Plaintiff for Defendant's refusal to perform the contract. Plaintiff has no plain, adequate, or speedy remedy at law, and is entitled to the equitable relief prayed for herein.

22.

Alternatively, if Defendant fails or is unable to perform its part of the agreement, Plaintiff has been damaged in the estimated amount of $1.5 million dollars, the reasonable net value of the property, to be proven at trial, and is entitled to recover that amount from the Defendant.

23.

Defendant's acts alleged in this complaint were done in bad faith, vexatiously, wantonly, and for oppressive reasons. Therefor, Plaintiff is entitled to an award of reasonable attorney's fees.

SECOND CLAIM FOR RELIEF

(Inverse Condemnation)

24.

In the alternative, Plaintiff realleges paragraphs 1-14, 16 and 17 of the Complaint, and they are incorporated by reference herein as if fully set forth.

25.

Defendant has placed a cloud of condemnation over the property, and physically intruded upon the property, and has thereby interfered with Plaintiff's use and enjoyment of his property right, and further frustrated Plaintiff's efforts to harvest and sell his boulders and rock in accordance with his reasonable, investment-backed

expectations, and deprived him of such use by a permanent taking of his property, without due process and just compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 18 of the Oregon State Constitution, upon taking all right, title and interest, through condemnation of Seida's property, with the intent to not perform Plaintiff's contract.

26.

As the result of Defendant's permanent taking, Plaintiff has been damaged in the estimated amount of $1.5 million dollars, the reasonable net value of the property, to be proven at trial, and is entitled to recover that amount from the Defendant.

27.

Defendant's acts alleged in this complaint were done in bad faith, vexatiously, wantonly, and for oppressive reasons. Therefor, Plaintiff is entitled to an award of reasonable attorney's fees.

WHEREFORE, Plaintiff prays for a judgment of the court in favor of Plaintiff, and against Defendant as follows:

1. On Plaintiff's First Claim for Relief (Specific Performance), directing Defendant to specifically perform the contract, under the terms and conditions set forth in the contract, beginning within such reasonable time as the court may provide;

2. Alternatively, on Plaintiff's First Claim for Relief (Specific Performance), awarding Plaintiff equitable relief against the Defendant that would allow Plaintiff to harvest and sell other boulders and rock in the same area, by directing Defendant to exchange with Plaintiff an amount of Defendant's undeveloped real property owned in the district, equal in value to an amount proven at trial, currently estimated at $1,500,000, plus interest, if Defendant fails or is unable to perform the contract with Plaintiff within such time as provided by the court;

3. Alternatively, on Plaintiff's First Claim for Relief (Specific Performance), awarding Plaintiff judgment against the Defendant in the amount proven at trial, currently estimated at $1,500,000, plus interest, if Defendant fails or is unable to perform the contract with Plaintiff within such time as provided by the court, and Plaintiff does not receive any of Defendant's real [sic] as prayed for in paragraph 3., above;

4. On Plaintiff's Second Claim for Relief (Inverse Condemnation), economic damages against Defendant in the amount proven at trial, currently estimated at $1,500,000;

5. On all Claims for Relief, costs and disbursements incurred herein; and

6. For such other relief as the Court may deem just and property.

APPENDIX F

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

WEST LINN – WILSONVILLE SCHOOL DISTRICT 3Jt Plaintiff, v. KENT SEIDA, JOYCE BURNETT, fka JOYCE SEIDA and DAVID SEIDA. Defendants.	Case No. 95-10-408 FINAL JUDGMENT (Filed Dec. 12, 1996)

This matter came on for trial on the 12th day of November, 1996 before the undersigned Judge, the plaintiff appearing by and through its attorney, Donald R. Stark, and the defendants appearing by and through their attorneys, William Hoelscher.

Prior to trial, Curtis Hunter moved to intervene and an Order was entered denying intervention. Curtis Hunter through his attorney, Jeff Seymour, has appealed the Order denying intervention. Pursuant to ORS 19.034 (1), plaintiff has raised the issue of whether or not the decision being appealed is appealable.

Prior to the commencement of trial, the parties and their attorneys negotiated and stipulated to an agreement for settlement of all of the issues between the parties, and the settlement was read into the record by the undersigned and verbally agreed to by all of the parties.

The transcript of the proceedings of the agreement and settlement of this matter is made a part of the record.

Based on the files and records herein, the **COURT HEREBY FINDS:**

1. The Order denying the motion of Curtis Hunter is not an appealable Order. The motion to intervene was premature and the Order of the Court preserved all legal and equitable rights to pursue his claim.

2. It is proper to proceed to Judgment pursuant to ORS 19.034 (2).

Based on the Settlement Agreement of the parties as agreed to in open Court, the **COURT HEREBY FURTHER FINDS:**

3. The property hereinafter described is necessary for a public use and purpose;

4. The surveyed area being acquired and hereinafter described contains 17.68 acres.

5. Based on the agreement of the parties, the just compensation to be awarded and paid to the defendants is as follows:

A. $70,0000 per acre times 17.68 Acres or $1,237,750.

B. Additional compensation for damages in the agreed amount of $50,000 [for construction of the road to the remaining property and reconstruction of the well and septic system [/s/ S.B.]

C. Defendant's attorneys fees in the amount of $25,000.00 and total costs in the amount of $4,000.00.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by this court as follows:

1.

Plaintiff is required to pay to the clerk of this court the total sum of $1,237,750 for just compensation; the sum of $50,000 for damages ~~to the remainder;~~ [/s/ S.B.] the sum of $25,000 attorneys fees; and the sum of $4,000 costs.

2.

Plaintiff shall make the first payment of $100,000 to the clerk of the Court within 10 days of the date of this judgment, and shall pay the balance of the monies described in paragraph 1. by the 10th day of January, 1997.

3.

The real property described in Exhibit A attached is immediately appropriated for public purposes and title and possession to said real property together with all rights and easements therein is vested in the plaintiff free of all claims of the defendants.

4.

Plaintiff is further ordered as follows:

A. To construct a ~~cattle-proof~~ [chain link /s/ S.B.] fence between the property acquired and defendants' remaining property;

B. To notify the defendants' attorney, William Hoelscher, of the need to terminate the use of a well on the property acquired at least 60 days prior to termination;

C. To partition the property acquired from defendants' remaining property;

D. To construct half-street improvements to Day Road in that portion of defendants' remaining property fronting on Day Road as approved by the City of West Linn or the County of Clackamas.

E. During construction of the school, plaintiff to keep open the access from Day Road to defendants' remaining property and construct any temporary fencing needed to contain defendants' cattle on their remaining property.

5.

Defendants are further ordered:

A. To cooperate with the plaintiff in conjunction with plaintiff's efforts to obtain any necessary governmental permits or approvals for plaintiff's intended use, provided that such cooperation will be at no cost to the defendants.

B. To consent to and to execute any specific applications to include but not limited to conditional use applications and partition of defendants' property.

C. To dedicate 10 feet along the frontage of Day Road to Clackamas County as is necessary and required to complete the half-street development to be built by plaintiff pursuant to paragraph 4. D. above.

E. By this Judgment, plaintiff is granted a construction permit to enter defendants' remaining property during construction to perform grading and filling as may be necessary and a permanent right to fill that portion of defendants' remaining property as indicated on Exhibit 19, attached hereto.

6.

This Court will retain jurisdiction of this matter to enforce performance of the terms of the settlement agreement by the parties.

7.

Under the authority of *State vs. Burk*, 200 Or 211 (1954), the court will disburse the funds on deposit to ~~interested parties~~ [defendants /s/ S.B.] at a supplemental hearing for that purpose [or as they agree. /s/ S.B.]

8.

There shall be no additional costs or attorneys fees to either party.

DATED this 12 day of Dec., 1996.

/s/ Sid Brockley
Sid Brockley
Circuit Court Judge

Presented by:

/s/ Donald R. Stark
Attorney for the Plaintiff